No. 17-432

In The Supreme Court of the United States

CHINA AGRITECH, INC.,

Petitioner,

v.

MICHAEL H. RESH, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PLAINTIFFS IN POST-*DUKES* SUCCESSOR CLASS ACTIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE SUCCESSOR WAL-MART CLASS CASES ILLUSTRATE THE PERMISSIBLE USE OF *AMERICAN PIPE* TOLLING..... 5

A. After clarifying the legal standards for class certification, the *Dukes* Court found the plaintiffs had failed to provide evidence sufficient to warrant certification of a national class 6

B. The *Dukes* plaintiffs followed this Court's guidance by bringing successor class actions that are regional in scope 8

C. The ability of plaintiffs in three regional Wal-Mart class actions to continue their claims collectively hinges on the Court's decision in the case now presented 12

D. The post-*Dukes* regional class cases achieve the economies that *American Pipe* intended to promote 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES:

American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) ..... *passim*

Brown v. Trustees of Boston Univ., 891 F.2d 337 (1st Cir. 1989) 16

Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983) ..... *passim*

Davis v. Romney, 490 F.2d 1360 (3d Cir. 1974) 16

Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004) 6

Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010) 6

Dukes v. Wal-Mart Stores, Inc., 964 F. Supp. 2d 1115 (N.D. Cal. 2013) 13

Dukes v. Wal-Mart Stores, Inc., 3:01-cv-02252 (N.D. Cal. Sept. 21, 2012) 11

Forbes v. Wal-Mart Stores, Inc., No. 9:17-cv-81225 (S.D. Fla. Nov. 6, 2017) 12

Ladik v. Wal-Mart Stores, Inc., 291 F.R.D. 263 (W.D. Wis. 2013) 13

Love v. Wal-Mart Stores, Inc., 865 F.3d 1322 (11th Cir. 2017) 12

Odle v. Flores, 3:11-cv-02954 (N.D. Tex. Jan. 3, 2018) 12

Odle v. Flores, 683 F. App'x 288 (5th Cir. 2017) 12

TABLE OF AUTHORITIES – Continued

Page

Phipps v. Wal-Mart Stores, Inc., 3:12-cv-01009 (M.D. Tenn. Nov. 18, 2016) 11

Phipps v. Wal-Mart Stores, Inc., 792 F.3d 637 (6th Cir. 2015) 13

Phipps v. Wal-Mart Stores, Inc., 925 F. Supp. 2d 875 (M.D. Tenn. 2013) 13

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010) 4

Smith v. Bayer Corp., 564 U.S. 299 (2011) 3

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) ..... *passim*

Yang v. Odom, 392 F.3d 97 (3d Cir. 2004) 11

Zepeda v. U.S. I.N.S., 753 F.2d 719 (9th Cir. 1983) 16

RULES:

Federal Rule of Civil Procedure 23 ..... *passim*

Federal Rule of Civil Procedure 23(a) 6

Federal Rule of Civil Procedure 23(b)(2) 3, 10

Federal Rule of Civil Procedure 23(b)(3) 3, 10

Sup. Ct. R. 37.3 1

Sup. Ct. R. 37.6 1

INTEREST OF *AMICI CURIAE*[1]

Amici are women who were members of the former national class challenging sex discrimination at Wal-Mart Stores, in which certification was reversed by the decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). As these women were members of the original national class, the limitations period governing their claims was tolled pursuant to *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974). *Amici* are plaintiffs in three successor cases who have sought to pursue their claims collectively under Federal Rule of Civil Procedure 23. While there is no dispute that *American Pipe* tolling would apply to their claims were they pursued individually, the timeliness of their claims has been challenged because they have elected to bring sex discrimination claims in more narrowly-framed regional cases brought as class actions.

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[1] Pursuant to this Court's Rule 37.3, counsel for petitioners and respondents have both granted blanket consent to the filing of all *amicus* briefs in letters on file with the Clerk of the Court. Pursuant to this Court's Rule 37.6, no counsel for a party has authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel have made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In *Dukes*, 564 U.S. 338, this Court reversed certification of a national class of women who alleged that Wal-Mart engaged in gender discrimination against female employees when making pay and promotion decisions throughout the country. The Court's decision was primarily based on a finding that the plaintiffs had failed to present sufficient evidence to justify certification of a national class, but left open the possibility that one or more differently-framed classes could be certified if they satisfied the newly-clarified requirements of Rule 23. On remand, former members of the *Dukes* class filed five more narrowly-defined class cases, each challenging discriminatory policies and practices within separate regions of Wal-Mart's operations.

In framing these successor class cases, the plaintiffs sought to address the deficiencies that this Court found to have been obstacles to class certification. First, rather than proceeding as a national class, the proposed classes are each limited to discrete regions of Wal-Mart's operations, following this Court's observation that the challenged practices may have varied by region. *Id.* at 359-60. Second, rather than challenge the exercise of broad discretion itself in the pay and promotion decisions, which this Court found did not qualify as an employment practice susceptible to challenge, *id.* at 355, the successor class plaintiffs challenge discrete employment practices and the decisions of a defined group of managers who made, and were responsible for, the alleged discriminatory pay and

promotion decisions. Third, rather than rely on statistical analyses that were national in scope to demonstrate the challenged practices had an adverse impact on the plaintiff class, the plaintiffs in these successor class cases rely on statistical comparisons based on populations defined by the region and store at which the challenged decisions were made. *Id.* at 356-58. Fourth, rather than seek certification of their back pay claims under Rule 23(b)(2), the successor class plaintiffs rely on Rule 23(b)(3). *Id.* at 361-63. While challenging the same underlying discriminatory conduct as the former national class, therefore, the successor regional class cases, like the plaintiffs in the pending cases, seek to overcome, rather than to re-litigate, the flaws in the original class that was rejected.

Having been members of a failed national class, the successor class plaintiffs are entitled to *American Pipe* tolling but are not bound by the adverse class certification ruling. *Smith v. Bayer Corp.*, 564 U.S. 299, 312 (2011) ("A court's judgment binds only the parties to a suit, subject to a handful of discrete and limited exceptions."). Thus, these successor class plaintiffs seek their first opportunity to prosecute their claims pursuant to classes designed to address the standards for certification clarified by the *Dukes* decision. While there is no dispute that these successor plaintiffs' claims would be timely if they were pursued individually, the choice to pursue the claims in regionally-defined classes has prompted a challenge to the continued availability of *American Pipe* tolling. Were *American Pipe* tolling denied to these women simply because they

elected to bring their claims collectively, rather than individually, they will have been deprived of a right simply because of the form of action they elected to pursue. As this Court ruled in *Shady Grove*, impediments to class certification may not be erected to the certification of claims that can satisfy the requirements of Rule 23. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398-99 (2010) (Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," and "provides a one-size-fits-all formula for deciding the class-action question."). And those who bring class cases in the future will no longer rely on the pendency of the original putative class to forbear from lodging their own class claims, resulting in "a needless multiplicity of actions – precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 351 (1983).

Having attempted to remedy the deficiencies in the *Dukes* national class action of which they were putative members rather than seeking to re-litigate the deficient features of that failed class, these successor class plaintiffs are entitled to the same rights to *American Pipe* tolling regardless of whether they pursue their claims individually or collectively.

ARGUMENT

I. THE SUCCESSOR WAL-MART CLASS CASES ILLUSTRATE THE PERMISSIBLE USE OF *AMERICAN PIPE* TOLLING

Seven years ago, this Court reversed certification of a national class of women who alleged sex discrimination in pay and promotions against Wal-Mart Stores. *Dukes*, 564 U.S. 338. Rather than hold as a matter of law that the plaintiffs' claims were not susceptible to class certification, the Court ruled that the record presented to the district court was insufficient to support certification of an expansive national class. In the wake of that decision, members of the former national class have sought to pursue claims on behalf of themselves and other members of that failed national class in more narrowly-framed successor class actions. The timeliness of their claims requires application of *American Pipe* tolling that was accorded them as members of the original national class. In these successor cases, former members of the *Dukes* class frame their class claims to address the deficiencies in the national class that were cited as grounds for reversal. As such, they demonstrate the judicial economy and equity that is achieved when class plaintiffs can benefit from *American Pipe* tolling after decertification of a differently-defined class of which they were putatively a part.

A. After clarifying the legal standards for class certification, the *Dukes* Court found the plaintiffs had failed to provide evidence sufficient to warrant certification of a national class

On June 21, 2004, the district court presiding over the *Dukes* litigation certified a nationwide class of female Wal-Mart retail sales employees with pay and/or promotion claims. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). After six years through the appellate process, an *en banc* panel of the Ninth Circuit largely affirmed the class order. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). On June 20, 2011, this Court reversed the Ninth Circuit's decision, thereby denying certification of the alleged nationwide class.

The Court found that the plaintiffs had failed to present proof of a general policy of discrimination or a common mode of exercising discretion sufficient to satisfy the commonality requirement of Rule 23(a). *Dukes*, 564 U.S. at 356-58. Wal-Mart had structured its retail operations into 41 regions across the country, and the Court concluded that the plaintiffs had failed to account for differences in the practices they challenged by region.

Rather than reject the viability of the plaintiffs' claims altogether or conclude the claims could never be certified as a class, the Court identified with particularity the shortcomings in the evidence that resulted in its failure to satisfy the commonality requirement of

Rule 23. The Court concluded that the plaintiffs had failed to provide "significant proof that Wal-Mart operated under a general policy of discrimination" required to certify a pattern or practice disparate treatment claim. *Id.* at 355. The Court likewise found that the plaintiffs failed to provide "convincing proof of a companywide discriminatory pay and promotion policy" or that there was "a common mode of exercising discretion" in the challenged practices that could warrant certification of the plaintiffs' national disparate impact claims. *Id.* at 357, 359.

The Court also found the plaintiffs' statistical evidence lacking. The statistics presented in the national class action demonstrated disparities nationally, but was not appropriately tied to the regional and store levels at which the challenged decisions were made. *Id.* at 356-58. And the plaintiffs' anecdotal evidence alone was too weak to raise an inference that Wal-Mart's personnel decisions were discriminatory. *Id.* at 358.

Because the Court's ruling was based on a failure of proof, its decision did not foreclose presentation of evidence to support certification of narrower class claims focused on the level at which pay and promotion decisions were made. The Court explained that claims "conceivably could" satisfy Rule 23's commonality requirement if they offered "proof that an employer operate[s] under a general policy of discrimination," even though the plaintiffs' evidence failed to support such a general policy of discrimination that would support a nationwide class. *Id.* at 353. Similarly, the Court left open the possibility of certifying claims that some

managers "may be guilty of intentional discrimination that produces a sex-based disparity" at something less than a company-wide level. *Id.* at 355.

This Court did not address, and certainly did not foreclose, certification of claims challenging policies and practices operating at Wal-Mart's regional level if they could satisfy the requirements of Rule 23 based on a more complete record. In fact, the Court observed that the plaintiffs were "subject to a variety of regional policies that all differed," allowing for the possibility that regional classes could be certified. *Id.* at 359-60. Not only did the Court reject certification of a national class on evidentiary grounds, but it also allowed for the possibility that class cases narrower in scope might be appropriate for class adjudication.

B. The *Dukes* plaintiffs followed this Court's guidance by bringing successor class actions that are regional in scope

Informed by this Court's ruling, plaintiffs brought successor class actions in five separate Wal-Mart cases, challenging gender disparities in the pay and promotion decisions made within the regions encompassed by each case and the policies and practices that contributed to those disparities.

Striking the balance prescribed by the *American Pipe* doctrine, these successor regional class cases are sufficiently similar to the claims advanced in the nationwide class case to avoid surprise to Wal-Mart, while seeking certification of classes materially

different from the national class that the Court rejected. By alleging the same pattern of gender discrimination in pay and promotion practices at Wal-Mart's stores that was at issue in the national class, the plaintiffs ensured that the successor cases involved the same subject matter as the national class, thereby avoiding the potential for abuse of which Justice Powell expressed concern in his concurrence in *Crown, Cork*, 462 U.S. at 355 (Powell, J., concurring).

At the same time, by altering the proposed regional successor classes to address the flaws in the national class cited by the *Dukes* Court, the plaintiffs have not sought to re-litigate the same class that the Court had previously rejected. Changes in the geographic scope, in the way the challenged practices have been framed, and in the granularity of the evidence offered to support the discrimination claims are all reflected in the successor regional class claims, and are therefore materially different from the national class that the *Dukes* Court rejected.

Informed by this Court's observation that the plaintiffs were "subject to a variety of regional policies that all differed," *id.* at 359, the successor class actions are framed regionally. In addition, each regional case challenges the decisions of a discrete group of managers who made, and were responsible for, the alleged discriminatory pay and promotion decisions. *Id.* at 350 (offering as an example of conduct that could satisfy the commonality requirement "the assertion of discriminatory bias on the part of the same supervisor"). In particular, the regional class complaints attribute

specific evidence of gender bias and gender stereotyping to managers who had a role in, or who generally influenced, the challenged pay and promotion decisions within each region. By focusing on a discrete team of supervisors, plaintiffs' allegations provide the "glue holding the alleged reasons for all [the employment] decisions together." *Id.* at 352.

The regional class claims also present substantially more granular and refined statistical analyses. The *Dukes* Court had faulted the statistical analysis the plaintiffs presented in support of their nationwide class, as the disparities observed "may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which plaintiffs' theory of commonality depends." *Id.* at 357. To address this, the regional plaintiffs have alleged disparities in pay and promotion decisions adverse to women drawn from statistical analyses conducted at the store (for hourly claims) and regional levels (for management claims) at which the challenged decisions were made.

The plaintiffs' successor regional class cases differ substantially from the *Dukes* case in several other respects. For example, the *Dukes* Court concluded that the claims seeking back pay were more properly subject to certification under Rule 23(b)(3) than under Rule 23(b)(2). *Id.* at 361-63. In response, the regional plaintiffs seek certification of claims to injunctive relief under Rule 23(b)(2) and claims to monetary relief under Rule 23(b)(3).

In sum, the allegations made, and the evidence gathered to support them, are unique to the regions where the successor class actions have been brought. The plaintiffs' newly-alleged facts distinguish the class claims in the regional actions from the class claims in the nationwide *Dukes* litigation. Without changing the underlying causes of action, the former *Dukes* plaintiffs brought successor class claims designed to remedy the flaws cited in the national class. *See Dukes v. Wal-Mart Stores, Inc.*, 3:01-cv-02252, Dkt. 812 (N.D. Cal. Sept. 21, 2012) at 8 (denying Wal-Mart's motion to dismiss post-*Dukes* regional class case where plaintiffs allege new evidence potentially sufficient to certify a class); *Phipps v. Wal-Mart Stores, Inc.*, 3:12-cv-01009, Dkt. 111 (M.D. Tenn. Nov. 18, 2016) at 11-12 (same).

These differences between the regional classes and the former national class ensure that the successor cases will not seek to re-litigate the flawed features of the national class. Instead, the successor class plaintiffs seek the opportunity to certify class claims that no court has ever addressed. *See Yang v. Odom*, 392 F.3d 97, 106 (3d Cir. 2004) ("[I]t would be at odds with the policy undergirding the class action device, as stated by the Supreme Court, to deny plaintiffs the benefit of tolling, and thus the class action mechanism, when no defect in the class itself has been shown."). Affording the plaintiffs a first chance to certify a class that has never previously been considered by a court is neither unfair to Wal-Mart nor an imposition on the courts.

C. The ability of plaintiffs in three regional Wal-Mart class actions to continue their claims collectively hinges on the Court's decision in the case now presented

The question whether plaintiffs in these regional successor class actions may retain their right to *American Pipe* tolling has occupied the parties for several years in three of the five regional class cases.

Texas. The Fifth Circuit ruled that the district court should have ruled on a motion to intervene for purposes of appealing the Northern District of Texas decision to strike class allegations on the grounds that *American Pipe* tolling was not available. *Odle v. Flores*, 683 F. App'x 288, 289 (5th Cir. 2017). Once the district court rules on intervention, the tolling issue will be ripe for review by the Fifth Circuit, but that case has been stayed pending a ruling in the case now presented before this Court. *Odle v. Flores*, 3:11-cv-02954, Dkt. 113 (N.D. Tex. Jan. 3, 2018).

Florida. The Eleventh Circuit, addressing an appeal from the Southern District of Florida after dismissal on the same unrelated procedural issue addressed in the Northern District of Texas, held that the appeal was untimely and therefore the Eleventh Circuit did not have jurisdiction to hear the appeal. *Love v. Wal-Mart Stores, Inc.*, 865 F.3d 1322, 1326 (11th Cir. 2017). However, a new Florida regional case, *Forbes v. Wal-Mart Stores, Inc.*, No. 9:17-cv-81225, Dkt. 1 (S.D. Fla. Nov. 6, 2017), has been filed and will present the *American Pipe* tolling issue.

Tennessee. In a regional case brought in the Middle District of Tennessee, the district court initially granted Wal-Mart's motion to dismiss on grounds that prior circuit precedent divested plaintiffs of *American Pipe* tolling when they pursued their claims collectively rather than individually. *Phipps v. Wal-Mart Stores, Inc.*, 925 F. Supp. 2d 875, 905 (M.D. Tenn. 2013). The Sixth Circuit reversed, ruling that prior circuit precedent permitted plaintiffs who brought successor class claims to retain their right to *American Pipe* tolling. *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 653 (6th Cir. 2015). As the Sixth Circuit found, where "no court had definitively addressed the requested class certification," *American Pipe* tolling remained available to plaintiffs who pursued their claims collectively. *Id.* at 647. Thus, nothing "bar[red] the plaintiffs' present effort to *certify for the first time* this timely-filed . . . class comprised of current and former female employees of Wal-Mart in Region 43." *Id.* at 649. The parties in that case are presently engaged in class-related discovery.

Wisconsin and California. In two other cases, one in the Western District of Wisconsin and the other in the Northern District of California, the district courts rejected the regional class claims on the merits, not on the basis of the unavailability of tolling. *Ladik v. Wal-Mart Stores, Inc.*, 291 F.R.D. 263, 273 (W.D. Wis. 2013); *Dukes v. Wal-Mart Stores, Inc.*, 964 F. Supp. 2d 1115, 1127 (N.D. Cal. 2013). And while the courts granted dismissal of those claims, those cases are factually distinguishable from the other regional class actions,

concerning different regions, with different records, and challenging different policies and groups of decision-makers.

D. The post-*Dukes* regional class cases achieve the economies that *American Pipe* intended to promote

As pointed out in *American Pipe* and *Crown, Cork*, Rule 23 encourages members of putative classes to refrain from pursuing their own claims while certification of the class of which they would be members is decided. *American Pipe*, 414 U.S. at 550 ("A federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions."); *Crown, Cork*, 462 U.S. at 352-53 ("Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims."). Once the national *Dukes* class was vacated, some of its former members brought differently- and more narrowly-framed class claims challenging the same conduct. Were they to lose their tolling, and with it the ability to bring differently-defined class claims, these former members of the *Dukes* class would lose their incentive to await a ruling on the original class certification before determining whether to proceed with their own class cases. Having awaited a final ruling on certification of the *Dukes* class, as *American Pipe* dictates, the successor regional class plaintiffs

should be entitled to proceed with their own class claims. *American Pipe*, 414 U.S. at 553; *Crown, Cork*, 462 U.S. at 350-51.

Absent the assurance that *American Pipe* tolling would have remained available to members of the original *Dukes* class, whether the members pursued their successor claims collectively or individually, they would have been compelled to file separate class and individual claims before the viability of the *Dukes* putative class was determined. The multiplicity of cases, styled individually and collectively, that would have been pending while certification of the *Dukes* national class was adjudicated would have imposed unnecessary burdens on the judiciary and the parties, and may have led to inconsistent rulings on class certification. This would have caused a "needless multiplicity of actions—precisely the situation that . . . Rule 23 and the tolling rule of *American Pipe* were designed to avoid." *Crown, Cork*, 462 U.S. at 351. Instead, as *American Pipe* and *Crown, Cork* intended, plaintiffs waited until there had been a final ruling on class certification before proceeding with their own claims and framed their class claims to accord with the lessons from the *Dukes* decision. In doing so, the former *Dukes* class members avoided the multiplicity of duplicative claims that would have undermined the effectiveness of Rule 23 while ensuring that Wal-Mart had prior notice of the gravamen of their claims. *American Pipe*, 414 U.S. at 554-55.

Nor can the successor regional class plaintiffs be faulted for awaiting a ruling on the *Dukes* class

certification before proceeding with their own class cases. As this Court observed, "[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 permits and encourages class members to rely on the named plaintiffs to press their claims." *Crown, Cork*, 462 U.S. at 352-53.

Moreover, denying the regional plaintiffs the benefit of *American Pipe* tolling would have an immediately harmful effect. Pursuit of these cases collectively may be the only way for plaintiffs to assert claims challenging the pattern or practice of discrimination Congress intended Title VII to prohibit. And preventing regional plaintiffs from moving forward as a class could impair their ability to secure the kind of injunctive relief necessary to address the underlying discriminatory conduct. Absent a certified class, private plaintiffs typically lack the ability to secure the broad injunctive relief that can eliminate widespread discrimination, as Congress intended Title VII to permit. *See Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) ("[C]lasswide relief, such as the injunction here . . . is appropriate only where there is a properly certified class."); *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) ("[An] injunction must be limited to apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs."); *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974) ("Relief cannot be granted to a class before an order has been entered determining that class treatment is proper.").

Thus, the pending successor regional class cases, like the *Resh* plaintiffs, illustrate the proper and effective application of *American Pipe* tolling to promote a consistent and efficient adjudication of class certification while providing adequate notice of the underlying claims to the defendant and permitting members of the original class to protect their right to pursue their claims collectively.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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